No. 80480-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

SATOMI OWNERS ASSOCIATION,

Respondent

v.

SATOMI, LLC,

Petitioner

BRIEF OF
PROFESSIONAL WARRANTY SERVICE CORPORATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER LESCHI CORP.

Bruce M. Thornton
5670 Wilshire Blvd., Suite 1500
Los Angeles, CA 90036
(323) 931-1093
bmt@gtblawyers.com

John K. Butler, WSBA 28528
1800 Ninth Ave., Suite 1500
Seattle, WA 98101-1340
(206) 287-1775
jbutler@pregodonnell.com

Counsel for *Amicus Curiae*,
Professional Warranty Service Corporation

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I. STATEMENT OF INTEREST

Professional Warranty Service Corporation (hereinafter "PWC") administers a nationwide, new-home warranty program in which many of America's largest and most respected home builders participate. Many of those builders, including the petitioner, Leschi Corp., are building or have built new communities in the State of Washington. On behalf of Leschi Corporation, PWC issued the Home Builder's Limited Warranty booklet to purchasers of condominium homes at The Pier at Leschi (CP 387–98). This booklet explains the Home Builder's Limited Warranty (hereinafter, "Limited Warranty") which Leschi Corp. provides and PWC administers.

Over the years, thousands of homes have been sold by PWC-participating home builders to Washington home buyers. Like the unit purchasers and members of the respondent, The Pier at Leschi Condominium Owners Association, each of those home buyers received from their builder a PWC-administered new home warranty which includes an agreement between the builder and the home buyer to arbitrate, rather than litigate, disputes arising out of or relating to the builder's express warranty.

The arbitration agreement contained within the Limited Warranty expressly provides that it is made pursuant to a transaction involving interstate commerce, and is to be governed by and interpreted under the Federal Arbitration Act. Thus, PWC has a compelling interest in this Court's review of the decision below which, we respectfully maintain, erroneously concluded that there is an insufficient nexus with interstate commence to implicate the terms of the Federal Arbitration Act and compel arbitration in accordance with the agreement between the seller

and buyer of a condominium home and in the seller's contractual obligation to perform warranty service on those homes.

II. THIS ARBITRATION AGREEMENT IS GOVERNED BY THE FEDERAL ARBITRATION ACT BECAUSE IT IS CONTAINED IN A CONTRACT USED IN INTERSTATE COMMERCE.

Section 2 of the Federal Arbitration Act (9 U.S.C. §§ 1–16, hereinafter the "FAA") provides that the FAA governs every arbitration agreement in "a contract evidencing a transaction involving commerce . . . ." In *The Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 123 S.Ct. 2037, 156 L.Ed.2d 46 (2003), the Supreme Court clarified that the FAA does not require an individualized "showing of a substantial effect on interstate commerce." *Id.*, 123 S.Ct. at 2039; emphasis added. The Court explained that it suffices to show that the transaction giving rise to the arbitration agreement is part of a commercial activity which, in the aggregate, impacts interstate commerce. *Id.*, 123 S.Ct. at 2040–41.

In addition to the nexus with interstate commerce sufficient to make the Limited Warranty's binding arbitration provisions enforceable (*i.e.*, the sale of condominium units to out-of-state buyers; the financing of home purchases by out-of-state mortgage lenders; and the use of out-of-state building materials to construct the homes), the FAA is undisputedly triggered because the contract containing the arbitration agreement was actually utilized in interstate commerce. The Limited Warranty includes an arbitration agreement that is solely administered by PWC. (CP 387–98.) PWC is a Virginia corporation with its principal place of business in Virginia. The PWC Limited Warranty Program, in which Leschi Corp. participates, is administered from Virginia: PWC's Home Builder's Limited Warranty booklet, and the limited warranty validation

forms, which are prepared by PWC and which identify the warranted home, the time period during which the warranty is in effect, and other home-specific information are all printed, packaged and issued in Virginia. (CP 401, 579–607.) Requests for arbitration under the Limited Warranty are made by mailing a Binding Arbitration Request Form to Virginia (CP 393–94, 396, 397), and upon sale of the home, a new owner is required to mail a "Subsequent Home Buyer Acknowledgement and Transfer" to Virginia. (CP 398.)

One of PWC's competitors is Home Buyers Warranty Corporation, a Colorado corporation which created and administers the Home Buyers Warranty Program and issues the "HBW Warranty." Like the PWC-administered Limited Warranty purchased by Leschi Corp. and provided to its home buyers, the HBW Warranty used by that company's participating builders includes an agreement that warranty disputes between builder and home owner will be arbitrated, rather than litigated. Numerous courts have held that the arbitration agreements in the HBW Warranties are governed by and enforceable pursuant to the FAA because the warranties were sold in interstate commerce, the parties were from different states, and/or the home was located in a state other than the domiciliary state of the warranty company. *See Lopez v. Home Buyers Warranty Corp.*, 628 So.2d 361 (Ala. 1993), *vacated and remanded, Home Buyers Warranty Corp. II v. Lopez*, 513 U.S. 1123, 115 S.Ct. 930, 130 L.Ed.2d 876 (1995), 670 So.2d 35 (Ala. 1995) (HBW Warranty on Alabama home); *Rainwater v. National Home Ins. Co.*, 944 F.2d 190, 191–92 (4th Cir. 1991) (HBW Warranty on Virginia home); *McKee v. Home Buyers Warranty Corp. II*, 45 F.3d 981, 984 (5th Cir. 1995) (HBW Warranty on Louisiana home); *Kelley v. Benchmark Homes, Inc.*, 250 Neb. 367, 373, 375, 550 N.W.2d 640 (1996), *disapproved on other*

grounds, Webb v. American Employers Group, 268 Neb. 473, 684 N.W.2d 33 (2004) (HBW Warranty on Nebraska home).

In *Lopez, supra*, the United States Supreme Court vacated the decision of the Alabama Supreme Court invalidating the arbitration agreement in the HBW Warranty as violative of Alabama's prohibition against enforcement of pre-dispute arbitration agreements, and remanded the case to the Alabama court for reconsideration in light of the U.S. Supreme Court's contemporaneous decision in *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 115 S.Ct. 834, 130 L.Ed.2d 753 (1995). The Alabama Supreme Court enforced the arbitration agreement under the FAA. *Lopez, supra*, 670 So.2d 35, 38.

Allied-Bruce, supra, was a landmark decision extending the FAA to the full reach of Congress under the Commerce Clause of the Federal Constitution. While the precise parameters of the FAA are still being defined, it unquestionably governs arbitration agreements in contracts such as the HBW Warranty and the similar PWC-administered warranty, which are actually utilized in interstate commerce.

III. THIS ARBITRATION AGREEMENT IS GOVERNED BY THE FEDERAL ARBITRATION ACT BECAUSE THE PARTIES HAVE SO AGREED.

This arbitration agreement contains the following provision: "This arbitration agreement shall be governed by the United States Arbitration Act (9 U.S.C. §§ 1–16) to the exclusion of any inconsistent state law, regulation or judicial decision." (CP 393.)

Parties are free to enter into an arbitration agreement specifying the controlling law. *Volt Information Services, Inc. v. Leland Stanford Jr. University*, 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989)

(arbitration agreement otherwise governed by FAA was governed by California Arbitration Act by reason of California choice-of-law provision, permitting California court to stay arbitration under California law). As the U.S. Supreme Court stated in *Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002): "Under *Volt*, when an arbitration agreement contains a choice-of-law provision, that provision must be honored, and a court interpreting the agreement must follow the law of the jurisdiction selected by the parties." *Howsam, supra*, 537 U.S. at 84.

In *Cronus Investments, Inc. v. Concierge Services*, 35 Cal.4th 376, 387, 107 P.3d 217, 25 Cal.Rptr.3d 540 (2005), the California Supreme Court affirmed an order denying arbitration on the basis of the same California statute construed in *Volt*, *supra*, after concluding that the parties had agreed that their arbitration agreement should be governed by California law. The court stated that the parties could easily have avoided this result by "expressly designat[ing] that any arbitration should move forward under the FAA's procedural provisions rather than under state procedural law." *Cronus, supra*, 35 Cal.4th at 394.

This suggestion was followed by the California Court of Appeals in *Rodriguez v. American Technologies, Inc.*, 136 Cal.App.4th 1110, 39 Cal.Rptr.3d 437 (2006), wherein the court stated:

> Thus, there is no ambiguity regarding the parties' intent. They adopted the FAA—all of it—to govern their arbitration. The FAA controls, including section 3 which requires the court to stay the judicial proceeding and compel arbitration. Although section 3 may not generally apply to state courts, here the parties did as *Cronus* suggested they could: They expressly designated *their* arbitration proceeding 'should move forward under the FAA's procedural provisions rather

> than under state procedural law.' (*Cronus*, *supra*, 35 Cal.4th at 394, 25 Cal.Rptr.3d 540, 107 P.3d 217.)
>
> Thus, the court erred by denying ATI's motion to compel arbitration and stay the court proceeding as to plaintiffs and ATI. In accordance with the agreement of the parties, section 3 of the FAA required the court to compel arbitration between plaintiffs and ATI and to stay the court proceeding with respect to their disputes with each other. While we may question the wisdom of the parties' choice, and decry the potential for inefficiency, delay, and conflicting rulings, the parties were free to choose their arbitration rules. The court will not rewrite their contract.

Rodriguez, supra, 136 Cal.App.4th at 1122.

In *Basura v. U.S. Home Corp.*, 98 Cal.App.4th 1205, 120 Cal.Rptr.2d 328 (2002), an arbitration agreement in a residential purchase agreement was unenforceable under California law. *Held*, it was enforceable under the FAA and was governed by the FAA because the arbitration agreement required the parties to arbitrate "as provided by the Federal Arbitration Act[.]" *Id.*, Cal.App.4th at 1214, n. 9.

The courts in other jurisdictions have also unanimously held that an FAA choice-of-law provision in an arbitration agreement is enforceable. *See, e.g., Ottawa Office Integration, Inc. v. FTF Business Systems, Inc.*, 132 F.Supp.2d 215, 219 (S.D.N.Y. 2001) (applying FAA "because the arbitration agreement specifically provides for the FAA to govern the arbitration."); *Primerica Financial Services, Inc. v. Wise*, 217 Ga.App. 36, 456 S.E.2d 631, 633 (1995) (arbitration agreement governed by FAA, where it provided "the right to enforce all provisions of this [agreement] . . . under the United States Arbitration Code, 9 U.S.C. 1 . . . .").

Neither of the arbitration agreements in *Marina Cove Condominium Owners Ass'n v. Isabella Estates*, 109 Wn.App. 230, 34 P.3d 870 (2001) or *Satomi Owners Ass'n v. Satomi, LLC*, 139 Wn.App. 175, 159 P.3d 460 (2007) contained an FAA choice-of-law provision. In fact, *none* of the cases upon which Respondent The Pier at Leschi Owners Association relies involved an FAA choice-of-law provision. Those cases are all distinguishable from the case at bar. This arbitration agreement is governed by the FAA because it says so, and no further showing need be made in this regard.

IV. THE ENFORCEMENT OF THIS ARBITRATION AGREEMENT WILL FURTHER IMPORTANT PUBLIC POLICY INTERESTS OF THE STATE OF WASHINGTON.

The reason many home warranties now contain arbitration agreements is much the same as the reason automobile warranties contain arbitration agreements: arbitration provides a swift, efficient, and inexpensive alternative to litigation. Most claims involve amounts which cannot be economically adjudicated in the judicial system. The more serious claims, such as those involving structural failure, often present threats to the health and safety of the occupants of the home, and should be resolved as quickly as possible. Construction defect disputes are ideally suited for arbitration because professional arbitrators specializing in construction defect disputes possess greater expertise in this field than most judges and juries.

Typically, the less expensive residential dwellings are condominiums, which are often purchased by entry-level buyers or fixed-income retirees. Homebuyers of modest means and advanced age are least

likely to be able to afford the expense and delay of the judicial system and are most likely to benefit from the economies and efficiencies of contractual arbitration.

Virtually all long-term, third-party administered new home warranties of the type offered in this case by Leschi Corporation, include binding arbitration agreements. In PWC's experience, builders are more likely to "step-up" and contractually obligate themselves to a longer term of warranty service if they can, at least marginally, manage their risk by avoiding the massive expenditure of resources – both time and money – so typical of residential construction litigation. Today, most of the largest homebuilders in the United States provide long-term express warranties to their customers and their reliance on the availability and enforceability of arbitration to resolve disputes fairly, quickly, and cost-effectively makes it possible for them to offer longer periods of warranty coverage on their homes. The Washington Supreme Court should encourage this salutary practice by following the decisions of numerous courts throughout the United States, including the U.S. Supreme Court, in holding that the arbitration agreements in these warranties are governed by and fully enforceable under the FAA.

V. CONCLUSION

For each of the foregoing reasons, this Court is respectfully requested to reverse the decision of the Superior Court.

RESPECTFULLY SUBMITTED this 15 day of August, 2008.

GEMMILL, THORNTON & BALDRIDGE LLP

By: _____

Bruce M. Thornton,
Cal. SBA 72933
5670 Wilshire Blvd., Suite 1500
Los Angeles, CA 90036
(323) 931-1093
bmt@gtblawyers.com

PREG O'DONNELL & GILLETT PLLC

By: _____

John K. Butler, WSBA 28528
1800 Ninth Ave., Suite 1500
Seattle, WA 98101-1340
(206) 287-1775
jbutler@pregodonnell.com

Counsel for *Amicus Curiae*,
Professional Warranty Service
Corporation

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